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Nos. 96-110, 95-1858

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

STATE OF WASHINGTON, *et al.*,
Petitioners,
v.
HAROLD GLUCKSBERG, M.D., *et al.*,
Respondents.

DENNIS C. VACCO, *et al.*,
Petitioners,
v.
TIMOTHY E. QUILL, M.D., *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth and Second Circuits

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BRIEF *AMICUS CURIAE* OF JULIAN M. WHITAKER, M.D. IN SUPPORT OF RESPONDENTS

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BRIEF *AMICUS CURIAE* OF JULIAN M. WHITAKER, M.D. IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICUS CURIAE*

Amicus curiae, Julian M. Whitaker, M.D. ("Dr. Whitaker"), respectfully submits this brief in support of Respondents in *State of Washington v. Glucksberg*, No. 96-100, and *Vacco v. Quill*, No. 95-1858.[1]

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[1] Dr. Whitaker has received the written consent of the Petitioners and Respondents in both cases. Those letters of consent have been filed with the Clerk of the Court.

Dr. Whitaker is a physician licensed to practice medicine in the states of California and Washington.[2] He is the Clinical Director of The Whitaker Wellness Institute in Newport Beach, California and the editor of *Health & Healing*, the nation's largest single editor health newsletter with approximately 500,000 subscribers.[3]

Many of those whom Dr. Whitaker treats are geriatric patients who suffer from chronic and debilitating illnesses. A minority of those patients are terminally ill in the latter stages of disease. Of those, a few suffer from severe and persistent pain despite the administration of higher dosage levels of appropriate pain relieving drugs. For them, a stark question inevitably arises: Are the moments of consciousness accompanied by severe and persistent pain worth enduring if no cure is possible and if time brings with it only more pain, greater need for pain medication, side effects from that medication, new kinds of pain from the progression of the disease, less freedom and personal dignity, and greater incapacity? Each person in this category will answer that question differently. Answers depend on each person's deeply held personal values and beliefs, unique life expereince, and unique tolerance for pain. Some will choose to endure until the disease conquers life by robbing every vital sign. Others will choose to end their agony by either (1) discontinuing life-sustaining treatment, (2) consuming lethal doses of pain killing medication, or (3) consuming other drugs that have the effect of ending life. Your *amicus* believes it neither morally appropriate nor consistent with this Court's prece-

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[2] Dr. Whitaker graduated from Dartmouth College in 1966 with a B.S. degree and Emory University in 1970 with an M.D. degree. He received his formal training in surgery as a resident at the University of California Medical School and in medicine as a physician with the Pritikin Institute in California.

[3] Dr. Whitaker is the author of five books on age-related diseases: *Reversing Heart Disease* (1985), *Reversing Diabetes* (1987), *Reversing Health Risk* (1989), *Natural Healing* (1994), and *What Your Doctor Won't Tell You About Bypass* (1995).

dent for the Government to deny competent, terminally ill patients freedom to elect a humane, dignified, and prompt departure from life rather than an extended dying process robbed of value and dignity by severe pain and incapacity.

To be sure, consistent with this Court's precedent, the state retains the power to regulate the conditions under which those choices are exercised. The state cannot, consistent with the precedent protecting "bodily integrity" and "control" over "one's person," deny the choice altogether. In those rare and horrible circumstances when a competent patient's terminal illness is accompanied by severe, unrelenting pain for which relief is not possible,[4] that patient has a constitutional liberty right to maintain bodily integrity and personal control by ending life and avoiding further agony and indignity. It offends the core meaning of Fourteenth Amendment liberty for the state to force a patient to endure ever greater pain and incapacity until death results.

SUMMARY OF ARGUMENT

The Court has long recognized a right to "bodily integrity," a right to "control [of] one's person." *See, e.g., Planned Parenthood v. Casey*, 505 U.S. 833, 915 (1992) (Stevens J., concurring in part and dissenting in part) (citing *Rochin v. California*, 342 U.S. 165 (1952), and

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[4] *See* American Medical Ass'n Council on Scientific Affairs, *Good Care of the Dying Patient*, 275 J.A.M.A. 474, 475 (1996):

> How commonly pain marks the actual experience of dying is uncertain, and estimates vary substantially across institutions, whether hospices or hospitals. Coyle et al reported that three of every four cancer patients have pain. Bonica's review of published reports indicates that more than half of cancer patients have severe pain. Saunders has claimed that one fourth of cancer patients have inadequate pain control when dying.

See also C.S. Cleeland, et al., *Pain and its Treatment in Out-patients with Metastic Cancer*, 330 New Eng. J. Med. 592 (1994).

Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942)). In these consolidated cases, the Court will decide whether that personal right is possessed by competent, terminally ill patients who elect to stop their pain and suffering by consuming life-ending medications. The Court will also decide whether there is any meaningful difference between death effected by a physician's cessation of life support and a physician's administration of palliative treatments,[5] on the one hand, and death effected by a physician's provision or prescription of life-ending medications, on the other.

Your *amicus* asserts that the right to bodily integrity, to control of one's person, protects the election of a competent, terminally ill person to stop his or her suffering through the ingestion of life-ending medications. Your *amicus* finds no principled basis for distinguishing between (i) cessation of life support, a legal alternative; (ii) administration of palliative treatments in doses known to be lethal, a legal alternative;[6] and (iii) provision or prescription of other life-ending medications, an alternative unlawful under the statutes here in issue. Any physician who would fulfill a patient's request for any one of the three modes of hastening death understands the probable outcome: death. By forbidding the third alternative, New York and Washington do not end physician-assisted suicide. Instead, they deny competent, terminally ill patients who wish to hasten death an essential option, one that avoids acts of self-inflicted violence, avoids a slow and painful demise through refusal of life-support, which causes starvation or suffocation, and avoids the incursion of pain at ever higher thresholds until an overdose of pain medication is prescribed. By forbidding the option of physician-assisted suicide through provision or prescription of life-ending medication, New York and Washington deny the competent, terminally ill patient control over his or her bodily integrity. That denial renders each such person a prisoner of legal procedure, forced to endure pain and suffering beyond a threshold that he or she can tolerate. Your *amicus*, therefore, urges the Court to uphold the decisions below and to recognize the existence of a constitutional liberty right of the competent, terminally ill to end their pain and suffering through ingestion of life-ending medications.

[5] *See* Courtney S. Campbell, *Suffering, Compassion, and Dignity in Dying*, 35 Duq. L. Rev. 109, 112 (1996) ("It is common knowledge . . . that palliative care for pain and suffering tends to significantly diminish the number of patient requests for a hastened and assisted death") (citing Sidney H. Wanzer, et al., *The Physician's Responsibility Toward Hopelessly Ill Patients: A Second Look*, 320 New Eng. J. Med. 844, 846-48 (1989)).

[6] Physician administration of pain relieving medications is considered lawful even if death results from overdosing. *See* George J. Annas, *Death by Prescription—The Oregon Initiative*, 331 New Eng. J. Med. 1240 (1994); Norman Contor, et al., *Pain Relief, Acceleration of Death, and Criminal Law*, 6 Kennedy Inst. Ethics J. 107 (1996). *See also* Thomas A. Preston, *Killing Pain, Ending Life*, N.Y. Times, Nov. 1, 1994, at A15.

ARGUMENT

I. COMPETENT, TERMINALLY ILL PATIENTS HAVE A CONSTITUTIONAL LIBERTY RIGHT TO STOP THEIR SUFFERING THROUGH INGESTION OF LIFE-ENDING MEDICATIONS

There are few principles more embedded in our constitutional law than that "liberty" within the Due Process Clause of the Fourteenth Amendment ~~that have~~ has substantive as well as procedural meaning.[7] The Court has held that a

[7] As the Court explained in *Planned Parenthood v. Casey*, 505 U.S. 833, 846-847 (1992):

> Although a literal reading of the Clause might suggest that it governs only the procedures by which a State may deprive persons of liberty, for at least 105 years, since *Mugler v. Kansas*, 123 U.S. 623, 660-661 . . . (1987), the Clause has been understood to contain a substantive component as well . . . As Justice Brandeis (joined by Justice Holmes) observed, "[d]espite arguments to the contrary which had seemed to me persuasive, it is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure. Thus all fundamental rights comprised within the term liberty are protected by the Federal

liberty interest will be protected if it is "fundamental." A fundamental liberty interest is one "implicit in the concept of ordered liberty" such that "neither liberty nor justice would exist if [it] were sacrificed," *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937); "so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) (*see also Michael H. v. Gerald D.*, 491 U.S. 110, 122 (1989) (citing *Snyder*)); or "deeply rooted in this Nation's history and tradition," *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977). Direct burdens upon fundamental liberty interests are impermissible unless "the governmental entity imposing the restriction can demonstrate that the limitation is both necessary and narrowly tailored to serve a compelling governmental interest." *Planned Parenthood v. Casey*, 505 U.S. 833, 929 (1992) (citing *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965)). Such burdens will not withstand scrutiny if less drastic means exist for achieving the government's purpose. *See, e.g., Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

Although the Court cannot disregard a "relevant tradition protecting, or denying protection to, the asserted right," *Michael H. v. Gerald D.*, 491 U.S. 110, 127 (1989), neither can it apply historical precedent mechanistically because in times past right violations have in fact become

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Constitution from invasion by the States" [citing *Whitney v. California*, 274 U.S. 357, 373 (1927)].

See also Bowers v. Hardwick, 478 U.S. 186, 191 (1986):

> It is true that despite the language of the Due Process Clauses of the Fifth and Fourteenth Amendments, which appears to focus only on the processes by which life, liberty, or property is taken, the cases are legion in which those clauses have been interpreted to have substantive content, subsuming rights that to a great extent are immune from federal or state regulation or proscription. Among such cases are those recognizing rights that have little or no textual support in the constitutional language. *Meyer*, *Prince*, and *Pierce* fall into this category, as do the privacy cases from *Griswold* to *Casey*.

deeply rooted in our nation's history and condoned by a majority. *See, e.g., Loving v. Virginia*, 388 U.S. 1 (1967) (invalidating a law prohibiting miscegenation despite a long history of public acceptance); *Roe v. Wade*, 410 U.S. 113 (1973) (invalidating abortion proscription despite the fact that abortion was an illegal act at common law); *Brown v. Board of Education*, 347 U.S. 483 (1954) (invalidating racial segregation in schooling despite a long history of public and legal acceptance of that practice); and *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 69 (1976) (rejecting requirement of husband's consent for married women to obtain abortion despite common law limitations on women's legal rights and status).[8] Moreover, advances in technology can affect the scope of a liberty interest and, indeed, what is and what is not protected by the Due Process Clause.[9]

In defining the meaning of "liberty," the Court implores caution. It proceeds with due regard for precedents that define the scope of liberty already protected by the Constitution, because "[t]he Court is most vulnerable and

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[8] *See also O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975) ("[m]ere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty") and *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 749, 789 (1986) (White, J., dissenting):

> The Constitution is not a deed setting forth the precise metes and bounds of its subject matter; rather, it is a document announcing fundamental principles in value-laden terms that leave ample scope for the exercise of normative judgment by those charged with interpreting and applying it. In particular, the Due Process Clause of the Fourteenth Amendment, which forbids the deprivation of 'life, liberty, or property without due process of law,' has been read by the majority of the Court to be broad enough to provide substantive protection against state infringement of a broad range of individual interests.

[9] *See Rochin v. California*, 342 U.S. 165, 171-172 (1952) ("To believe that this judicial exercise of judgment could be avoided by freezing 'due process of law' at some fixed stage of time or thought is to suggest that the most important aspect of constitutional adjudication is a function for inanimate machines and not for judges").

comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution." *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986).

In that regard, this Court has long recognized that the liberty right protects individual, life-affecting elections of the most personal nature: "Our cases have long recognized that the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government." *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 772 (1986), *citing Carey v. Population Services International*, 431 U.S. 678 (1977); *Moore v. East Cleveland*, 431 U.S. 494 (1977); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923); and *Whalen v. Roe*, 429 U.S. 589, 598-600 (1977). For example, this Court has recognized as fundamental and, so, beyond the government's reach, the right to bear or beget a child, *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); to establish a home and raise children, *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); to marry, *Loving v. Virginia*, 388 U.S. 1 (1967); to procreate, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); to use contraceptives, *Griswold v. Connecticut*, 381 U.S. 479 (1965); to direct the upbringing and education of a child, *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535 (1925); to decide independently, with the advice of a physician, to acquire and to use needed medication, *Whalen v. Roe*, 429 U.S. 589, 603 (1977); to avoid unwanted administration of antipsychotic drugs, *Washington v. Harper*, 494 U.S. 210, 221-222 (1990); and to refuse unwanted medical treatment, *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 281 (1990). In each of these cases, the Court has protected "personal autonomy" from government deprivation. *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 791 (1986) (White, J., dissenting).

In *Planned Parenthood v. Casey*, 505 U.S. 833, 847 (1992), reflecting upon this precedent, the Court wrote of a "realm of personal liberty which the government may not enter" that involves "the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy." *Id.* at 851. The Court found such choices to be "central to personal dignity and autonomy" and "central to the liberty protected by the Fourteenth Amendment." *Id.* Indeed, the Court explained that "the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." *Id.*

Constitutional liberty, this Court has already concluded, embraces personal, life-affecting decisions, such as the decision to abort a fetus or to refuse medical treatment:

> *Roe* [*v. Wade*] . . . may be seen not only as an exemplar of *Griswold* liberty but as a rule (whether or not mistaken) of personal autonomy and bodily integrity, with doctrinal affinity to cases recognizing limits on governmental power to mandate medical treatment or to bar its rejection. If so, our cases since *Roe* accord with *Roe*'s view that a State's interest in the protection of life falls short of justifying any plenary override of individual liberty claims. *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 278 (1990) . . . . see also, *e.g.*, *Rochin v. California*, 342 U.S. 165 (1952) . . . *Jacobson v. Massachusetts*, 197 U.S. 11, 24-30 . . . (1905).

Planned Parenthood v. Casey, 505 U.S. at 857.

Because "liberty" encompasses personal, life-affecting decisions such as whether to abort a fetus, to refuse unwanted drugs, or to refuse unwanted medical treatment necessary to sustain life, it would be illogical, and a radical departure from precedent, to hold that it does not also protect a competent, terminally ill patient's election to forego further suffering by ingesting a life-ending med-

ication. The Court's personal liberty rationale for protecting the right to abort and the right to refuse treatment applies with equal validity to a competent, terminally ill person's election to ingest life-ending medication.

In most instances, the constitutionally protected refusal of hydration, feeding, and artificial respiration brings on a slow, agonizing death: starvation or suffocation. The practice of escalating pain medication until death results (also widely condoned by law) is another slow and painful approach. The methods are, however, indistinguishable in ultimate effect from the provision or prescription of life-ending medication. It would therefore offend this Court's precedent, and basic logic, to deny constitutional protection for physician-assisted suicide in the case of competent, terminally ill persons.

A. Historic Antecedents to the Right to Bodily Integrity and to Control of One's Person

The understanding of "liberty" that originally animated the Fifth Amendment, and later came to be the core understanding of the Fourteenth Amendment, arose in the seventeenth and eighteenth centuries with the opposition political movement to the Hanoverian Kings (the so-called "Radical Whigs") and held sway in the colonies and with the original founders.[10] The revolutionary legislators

[10] *See* Bernard Bailyn, 1 Pamphlets of the American Revolution *1750-1776* 28-29 (1965); Steven J. Heyman, *The First Duty of Government: Protection Liberty and the Fourteenth Amendment*, 41 Duke L. J. 507, 516 (1991) (. . . a small group of radical Whig opposition writers . . . had a crucial impact on the development of American political thought in the decades leading up to the Revolution"). Two Radical Whigs, Thomas Gordon and John Trenchard, were most notable in the American colonies for their collection of 138 essays on civil and religious liberty that were published in book form and entitled *Cato's Letters*. First published serially in *The London Journal* from 1720 to 1723, the essays were republished as books and went through six editions between 1723 and 1755. Historian Bernard Bailyn writes:

> Republished entire or in part again and again in the colonies, "quoted in every colonial newspaper from Boston to Savannah," and referred to repeatedly in the pamphlet literature, the writings of Trenchard and Gordon ranked in the minds of the Americans with treatises of Locke as the most authoritative statement of the nature of political liberty and above Locke as an exposition of the social sources of the threats it faced.

Bernard Bailyn, 1 *Pamphlets of the American Revolution 1750-1776* 30 (1965). Historian Forrest McDonald notes that *Cato's Letters* were "widely read by American patriots." F. McDonald, *Novus Ordo Seclorum* 47 (1985). Historian Jeffrey Smith finds that *Cato's Letters* "were immensely popular in America, where journalists and political theorists praised and imitated the authors." Jeffrey Smith, *Printers and Press Freedom* 25 (1988).

of the newly formed states gave legal force to these conceptions of liberty by rendering them among the "inalienable" rights protected under the original state constitutions.[11]

As for the meaning of "liberty" pertinent to medical treatment, the Radical Whigs Trenchard and Gordon defined the term in words similar to those later chosen by Justice Brandeis.[12] Gordon and Trenchard believed liberty a right "to live upon one's own terms."[13] With particular pertinence to government regulation of suicide, Trenchard and Gordon wrote:

> But whilst Men have their five Senses, I cannot see what the Magistrate has to do with Actions by which the Society cannot be affected; and where he meddles with such, he meddles impertinently or tyrannically. Must the Magistrate tie up every Man's Legs, because some Men fall into Ditches? . . . . Or, would it become the Wisdom and Care of Governors to establish a travelling [sic] Society, to prevent People, by

[11] *See* ROBERT RUTLAND, *The Birth of the Bill of Rights, 1776-1791* 42 (1983).

[12] Justice Brandeis considered the "liberty" right a "right to be let alone." *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

[13] 1 *CATO's Letters* 249 (L. Levy ed., Reprint 1971).

> proper Confinement, from throwing themselves into Wells, or over Precipices; Or to endow a Fraternity of Physicians and Surgeons all over the Nation, to take Care of their Subjects Health, without being consulted; and to vomit, bleed, purge, and scarify [sic] them at Pleasure, whether they would or no, just as these established Judges of Health should think fit? If this were the Case, what a Stir and Hubbub should we soon see kept about the established Potions and Lancets . . . Let People alone, and they will take Care of themselves, and do it best . . .

1 *CATO's Letters* 247 (L. Levy, ed. 1971).

Thus, strong conceptions of personal autonomy and freedom from restraint (even restraint against suicide) were deeply rooted in our historic understanding of "liberty"—a legacy of the eighteenth century Radical Whigs. Additional meaning for the term "liberty" came from Coke, Blackstone, and Locke but "[w]hat integrated all these sources into a coherent world view for Americans, as Bernard Bailyn and Gordon Wood have shown, was radical Whig ideology." [14]

Coincidental with the popular and political definitions of "liberty" communicated by the Radical Whigs were the eighteenth and nineteenth century legal understandings of the term derived from Chapter 29 of the Magna Carta.[15] In his *Commentaries on the Laws of England*, William Blackstone defined certain liberty rights as "abso-

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[14] *See* Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 Duke L. J. 507, 521 (1991).

[15] Chapter 29 of the Magna Carta provides: "No freeman shall be taken, or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any otherwise destroyed; nor will [the sovereign] pass upon him, nor condemn him, but by lawful Judgment of his Peers, or by the Law of the Land." Magna Carta ch. 29 (1225) (Eng.), 1 Stat. at Large 7-8 (London, 1763).

lute" and others as "relative." [16] The absolute rights included those to "personal security, personal liberty, and private property." [17] "Personal security" included "a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation." [18] "Personal liberty" included freedom of movement "without imprisonment or restraint, unless by due course of law." [19] "Private property" included "the free use, enjoyment, and disposal of all [one's] acquisitions, without any control or diminution, save only by the laws of the land." [20]

In America, the rights to "personal security, personal liberty, and private property" became those to "life, liberty, and property" but carried much of the Blackstonian meaning. The protection of those rights for all Americans regardless of race was a principal aim of the Fourteenth Amendment.[21] As this Court has recognized repeat-

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[16] "Absolute rights were those that would belong to individuals in a state of nature. By contrast, relative rights were those that were 'incident to [persons] as members of society, and standing in various relations to each other.'" The "first and primary end of human laws' was 'to protect individuals in the enjoyment of [their] absolute rights'; the protection of relative rights was a secondary aim." Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 Duke L. J. 507, 532 (1991) (quoting William Blackstone, 1 *Commentaries on the Laws of England* 123-124; 134; 422 (St. George Tucker ed., 1803 & photo reprint 1969)).

[17] William Blackstone, 1 *Commentaries on the Laws of England* 129 (St. George Tucker ed., 1803 & Photo reprint 1969); James Kent, 2 *Commentaries on American Law* 1-37 (1826); Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 Duke L. J. 507, 532 (1991).

[18] William Blackstone, *Commentaries on the Laws of England* 129 (St. George Tucker ed., 1803 & photo reprint 1969).

[19] *Id.* at 134.

[20] *Id.* at 138.

[21] *See* Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 Duke L. J. 507,

edly, the liberty right protected by the Fourteenth Amendment includes, at its core, the Blackstonian rights to personal security and personal liberty.[22]

The Court's recognition of a right to "bodily integrity" and "to control" of "one's person"[23] is in complete accord with the core meaning of the liberty right: the Blackstonian meaning (its barrier to state deprivation of "personal security" (*i.e.*, personal control over one's life, limbs, body, and health) and of "personal liberty" (*i.e.*, freedom from restraint)). So too is the Court's decision in *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 278 (1990) that "a competent person has a constitu-

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546-570 (1991). "[A]s the congressional debates indicate, when the Framers referred to 'life, liberty [and] property,' they principally mean the *rights* to life, liberty and property. They identified these rights with 'the absolute rights' of individuals recognized in the classical legal tradition: the rights to personal security, personal liberty, and private property." *Id.* at 561-562.

[22] *See Ingraham v. Wright*, 430 U.S. 651, 673-674 (1977) ("While the contours of this historic liberty interest in the context of our federal system of government have not been defined precisely, they always have been thought to encompass freedom from bodily restraint and punishment [citing *Rochin v. California*, 342 U.S. 165 (1952)]"); *Youngberg v. Romeo*, 457 U.S. 307, 315 (1982) ("In the past, this Court has noted that the right to personal security constitutes a 'historic liberty interest' protected substantively by the Due Process Clause [citing *Ingraham v. Wright*, 430 U.S. 651, 673 (1977)]"; *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 18 (1979) (Powell, J., concurring in part and dissenting in part) ("Liberty from bodily restraints always has been recognized as the core of the liberty protected by the Due Process from arbitrary government action"); and *Sandin v. Conner*, 115 S.Ct. 2293, 2307 (1995) (Breyer, J., dissenting) ("In protecting liberty . . . the Due Process Clause protects . . . an absence of government restraint, the very absence of restraint that we call freedom").

[23] *Planned Parenthood v. Casey*, 505 U.S. 833, 915 (1992) (Stevens, J., concurring in part and dissenting in part) (citing *Rochin v. California*, 342 U.S. 165 (1952), and *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 585 (1942)).

tionally protected liberty interest in refusing unwanted medical treatment . . ."

The petitioners and certain of their *amici* call on the Court to sever from the right to bodily integrity an essential exercise of that right. On the one hand, petitioners laud protection of a terminal patient's election to end artificial life support but, on the other, they condemn protection of a terminally ill patient's election to ingest a life-ending medication. Their position is untenable in law and logic.

In both cases, it is the patient's desire to die and it is the physician's action that initiates a causal chain of events that logically results in death. In neither case, does "nature" take its course because there have been substantial artificial interventions: (1) the use of medical devices to infuse the body with life through artificial respiration, nourishment, and hydration and (2) the chronic use of cytotoxic drugs or pain killing medications to mask the very cruel "nature" of a cancer or other painful and terminal illness.

There is no principled distinction to be drawn between the two cases. The critical issue in both is whether the state has imposed a restraint upon bodily integrity that denies a terminally ill patient control over his or her person. A constraint that precludes a person's physician from ceasing life support to comply with a patient's wishes is of no material difference from one that precludes a person's physician from providing or prescribing a lethal dose of pain medication or a lethal dose of life-ending medication. In each case the liberty interest consists of the right to effectuate the terminally ill patient's desires to end suffering by hastening death. In each case, when the state intrudes to preclude effectuation of that desire, it invades the patient's bodily integrity, robs the patient of control over his or her person, and imposes its

command that the patient live in pain and incapacity on one who would rather end the ordeal.[24]

As Justice O'Connor presciently observed in *Cruzan*:

> A seriously ill or dying patient whose wishes are not honored may feel a captive of the machinery required for life-sustaining measures or other medical interventions. Such forced treatment may burden that individual's liberty interests as much as any state coercion [citing *Washington v. Harper*, 494 U.S. 210, 221 (1990) and *Parham v. J.R.*, 442 U.S. 584, 600 (1979)].

497 U.S. at 288 (O'Connor, J., concurring).

B. The Common Law Prohibition on Suicide Does Not Define "Liberty" and Is Anachronistic

The petitioners and some of their *amici* contend that the Court should not recognize a constitutional right to physician-assisted suicide because at common law in pre-revolutionary America suicide was unlawful.[25] The conclusion reached, however, does not follow, and petitioners' reliance upon the common law suicide prohibition is misplaced. The Fourteenth Amendment's "liberty" term has never before been defined with reference to physician-assisted suicide. In addition, the world view that originally led to a general condemnation of suicide was predicated on a mystical conception of illness, dying, and death that has since been supplanted by a modern scientific view and understanding of those conditions. If the Court ties "liberty" to the pre-revolutionary view, it will cause the Four-

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[24] *See generally* Sanford Kadish, *Letting Patients Die: Legal and Moral Reflections*, 80 Calif. L. Rev. 857, 864, 868 (1992).

[25] *See generally* Thomas J. Marzen, et al., *Suicide: A Constitutional Right?*" 24 DUQ. L. REV. (1985); *Suicide: A Constitutional Right?—Reflections Eleven Years Later*, 35 Duq. L. Rev. 261 (1996).

teenth Amendment to become an anachronism rather than a vital force capable of transcending the ages.[26]

Even if the history of the common law in pre-revolutionary America is credited as evidence of the meaning of "liberty" within the Fourteenth Amendment, the eighteenth century ban on all suicides is anachronistic. People of the eighteenth century could not discern whether illness was terminal, nor did they have any understanding of microbiology. Disease, dying, and death were shrouded in mystery. Disease, dying, and death were frequently attributed to acts of God or Satan.[27] In short, while in eighteenth century America the onset of illness and the

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[26] Oliver W. Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 469 (1897): "It is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."

[27] The patient of the eighteenth century lived in an age when medicine was in its infancy (not until the late nineteenth century did microbiology reveal a previously invisible world of pathological agents). *See* 1 COMPANION ENCYCLOPEDIA OF THE HISTORY OF MEDICINE 65 (W.F. Bynum & R. Porter, ed. 1993). Medicine of the eighteenth century could not accurately diagnose disease, relied heavily upon frequent "bleedings" and "purgings" to rid the body of "evil humors," rarely discerned the presence of terminal illness, could not inform the patient with any degree of confidence of the nature or extent of pain associated with disease progression, and could not predict within reason the likely time of the patient's demise. *See Id.* at 320 ("[I]n the eighteenth century sickness remained a mysterious and unavoidable event resulting from fate or divine retribution"; "[m]inisters and priests continued to participate in . . . folk-healing schemes, a fact attested to by *Primitive Physick*, a widely circulated health manual by the Methodist John Wesley (1703-91)"; and "[t]he disease process was still most commonly explained in terms of a febrile crisis within the body, involving a 'coction' of peccant matter, resolved by excretion of this matter through the body's pores or orifices"). There was no scientific way to adjudge the quality of life or longevity.

arrival of death were simply not understood (the people of the time believed mystical external forces governed fate and should not be tampered with by mortal man), in twentieth century America the onset of illness and the arrival of death are generally understood. Indeed, unlike in the eighteenth century, it is now possible to segregate from the universe of all diseases a specific and limited class of illness that remains incurable. We now know scientifically the diseases drugs can treat successfully and those they cannot. We can also generally predict the time and nature of death for the terminally ill.[28] Many of the mysteries surrounding disease, dying, and death are gone. To a far greater extent than ever before, modern medical technology influences each of the processes of life and dying. We live into our sixties, seventies, and eighties through artificial interventions, including xenobiotic drugs and medical devices, and we die when those interventions no longer succeed in stemming the onslaught of ever persistent disease.

Hence, a general public condemnation of suicide in a society where life and death were believed to be commanded by mystical and religious forces cannot reasonably support argument for a specific condemnation of the provision of prescription of life-ending medication in our time. Lacking a direct casual connection between the prerevolutionary common law condemnation of suicide and the meaning of the Fourteenth Amendment's "liberty"

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[28] For example, the Medicare hospice benefit is limited to persons whose physicians attest that the patient has "a terminal illness with a life expectancy of six months or less." Health Care Finance Administration, *Medicare Part B Reference Manual*, Revision 020, (Aug. 23, 1996). Only 15% of patients receiving hospice care under Medicare Part B are alive for six months or more; the median survival time is approximately thirty-six days. Nicholas Christakis, et al., *Survival of Medicare Patients After Enrollment in Hospice Programs*, 335 New Eng. J. Med. 172-178 (1996).

term, this Court has no proper foundation for construing the Fourteenth Amendment's "liberty" term to prohibit a competent, terminally ill patient's election to ingest life-ending medications. Instead, as it has done repeatedly in the past, the Court should look to the meaning intended for the "liberty" term in Anglo-American history before the adoption of the Fifth and Fourteenth Amendments (a meaning that embraces protection for "bodily integrity" and "control" of "one's person").

Unlike the restrictive definition urged upon the Court by the petitioners, the more enlightened definition gleaned from the history underlying the Fifth and Fourteenth Amendments has the benefit of being both "rooted in the traditions and conscience of our people," *Snyder v. Massachusetts*, 291 U.S. at 105, and "implicit in the concept of ordered liberty" as defined by this Court's precedent.

II. THERE IS NO COMPELLING STATE INTEREST TO JUSTIFY VIOLATION OF THE LIBERTY RIGHT

Certain *amici* supporting the petitioners have argued that life in the final days of existence with a terminal illness can be rendered bearable through the administration of pain killing medication. They argue that patients informed of means to treat pain are usually persuaded to forego hastening death. Moreover, they argue that cancer patients contemplating physician-assisted suicide may be victimized by relatives who seek an inheritance or physicians more concerned with conserving medical resources than tending to the needs of a dying person.

In fact, for a significant minority of the terminally ill, adequate pain relief is not possible. Furthermore, untoward influences from physicians and family members, albeit a genuine concern, are matters ripe for tailored state regulation. There is no reason to conclude that the less restrictive alternative of tailored state regulation (such as mandatory second opinions and psychiatric evaluations)

would be an inadequate alternative to proscription of the right.

A. For at Least 10% of Terminally Ill Patients Adequate Pain Relief Is Not Possible

It is indeed true that in the vast majority of cases the terminally ill can cope with their pain through most, if not all, stages of disease progression if appropriate palliative treatments are administered. But even optimistic estimates on the success of pain management admit that at least 10% of terminally ill patients suffer from uncontrollable pain.[29] It is for them that palliative treatments afford inadequate relief.[30]

Patients with cancer often have multiple pain problems. Cancer pain may be due to (1) tumor progression and related pathology (e.g., nerve damage), (2) operations and other invasive diagnostic or therapeutic procedures, (3) toxicities of chemotherapy and radiation, (4) infection, or (5) muscle aches when patients limit physical activity. The incidence of pain in patients with cancer depends on the type and stage of disease. At the time of diagnosis and at intermediate stages, 30 to 45 percent of patients experience moderate to severe pain. On average, nearly 75 percent of patients with advanced cancer have pain. Of cancer patients with pain, 40 to 50 percent report

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[29] *See, e.g.*, Susan S. Land & Richard B. Patt, *You Don't Have to Suffer* 67 (1994):

> A concerned and knowledgeable doctor, from any specialty, can help up to 90 percent of patients achieve good control of pain. This process can be time consuming through no fault of his .... The key is to accept in advance that rarely can a doctor get it right the first time.

[30] Perhaps in time research will offer a cure for the currently incurable diseases or a means to alleviate intractable pain in all cases. Until that time, however, a significant minority of terminally ill patients will continue to need an alternative to the escalation of pain and incapacity that precedes their demise.

it as moderate to severe, and another 25 to 30 percent describe it as very severe.[31]

There is a wide spectrum in pain types.[32] The level, degree, and nature of pain varies depending on the terminal illness. Dr. Kathleen Foley's research led her to conclude that 85% of patients with primary bone tumors, 52% of patients with breast cancer, 20% of patients with lymphoma, and 5% of patients with leukemia had pain, She also found that 78% of hospitalized cancer patients had pain due directly to tumor involvement, 50% had pain due to bone disease, 25% had pain due to nerve compression, and 19% had pain due to the treatments they were given.[33]

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[31] *See* Kathleen M. Foley, *Pain Sydromes in Patients With Cancer* (1978); C.S. Cleeland, et al., *The Prevalence and Severity of Pain in Cancer*, 50 CANCER 1913-1918 (1982); J. Bonica, 1 *Cancer Pain —The Management of Pain* 400-460 (2d ed., 1990).

[32] *See* Kathleen M. Foley, *The Treatment of Cancer Pain*, 313 New Eng. J. Med. 85 (1985).

[33] *See* Kathleen M. Foley, *The Treatment of Cancer Pain*, 313 New Eng. J. Med. 85-86 (1985). Dr. Foley identifies two general categories of pain: acute and chronic. Acute pain is associated with hyperactivity of the autonomic nervious system. Acute pain is subcategorized into pain that is cancer-related (*i.e.*, pain that gives rise to the initial cancer diagnosis) and pain that is treatment-related (*i.e.*, pain occurring after administration of cytotoxic chemotherapy drugs and radiation therapy). Chronic pain is defined as pain that persists longer than 6 months in which adaptation of the autonomic nervous system occurs. Chronic pain transforms the person by permanently impairing their functional ability, altering their personalities, and affecting their lifestyles. Chronic pain is subcategorized into those that are cancer-related, involving pain arising from progression of the disease, and pain that is independent from and pre-exists the cancer. Foley identifies a subgroup consisting of those whose acute or chronic pain is accompanied by preexisting chronic pain unrelated to their cancer and a subgroup consisting of patients with a history of drug addition and cancer-related pain for which palliative treatment is rendered exceedingly complex because of the need to control the addiction. Foley's fifth

While palliative treatments can eliminate pain in a substantial number of cancer and AIDS cases, there remain those for whom such treatments are inadequate. It is precisely those patients whose rights must be protected should they elect to ingest life-ending medications rather than fight an unwinnable battle.

B. There Are Numerous Less Restrictive and Fully Adequate Alternatives to Proscription of the Right

There can be no doubt that from time to time certain individuals possessed of malicious intent (whether family members, friends, or physicians) will exert an untoward influence on the terminally ill, urging them to make a decision for or against physician-assisted suicide that may not be the one the patient would make if fully possessed of independent reason. That problem, and, indeed, any other abuse of the right, can be remedied by tailored state regulation (*i.e.*, regulation having only an incidental effect on the exercise of the right). An argument that presupposes abuse of a right as a justification for suppressing it is a classic fallacy of logic.

Tailored regulation of means by which to effectuate fulfillment of a right (*i.e.*, indirect regulation) is not a violation of the right itself. This Court has upheld a considerable number and variety of regulations designed to foster independent judgment in those who contemplate abortion. *See, e.g., Planned Parenthood v. Casey*, 505 U.S. 833, 873-874 (1992).[34] The states are free to enact

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subgroup, consisting of acute and chronic pain suffered by cancer patients who are dying, include people affected by the decisions in the consolidated cases. These individuals, she notes, require a rapid escalation in analgesic drug therapy and efforts to address each of the various pain symptoms that arise as the varying kinds of pain all come to bear at once.

[34] In *Casey*, the Court elaborated upon the distinction between regulations that have an incidental effect on the exercise of a right and those that "strike at the right itself." The analogy has perfect application to the instant cases. The Court explained:

> As our jurisprudence relating to all liberties save perhaps abortion has recognized, not every law which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right. An example clarifies the point. We have held that not every ballot access limitation amounts to an infringement of the right to vote. Rather, the States are granted substantial flexibility in establishing the framework within which voters choose the candidates for whom they wish to vote [Citations omitted].
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> The abortion right is similar. Numerous forms of state regulation might have the incidental effect of increasing the cost or decreasing the availability of medical care, whether for abortion or any other medical procedure. The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it. Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause.

Casey, 505 U.S. at 874-875.

similar regulations that will foster independent judgment in competent, terminally ill patients who contemplate physician-assisted suicide.

CONCLUSION

For the reasons stated above, the judgments of *Glucksberg* and *Quill* should be affirmed.

Respectfully submitted,

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